No. 3758

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB (a corporation) and BJARNE ERIKSEN (an individual),	*Appellants,*
vs.	
CALIFORNIA & ORIENTAL STEAMSHIP COMPANY (a corporation),	*Appellee.*

BRIEF FOR APPELLEE.

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vs.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLEE.

Statement of the Case.

In this appeal from the interlocutory order of the District Court appointing a receiver *pendente lite,* this Honorable Court is trying the question of whether or not the District Judge improvidently exercised his legal discretion in making such interlocutory order. It is, therefore, essential to plaintiff, and only fair to the Judge below, that this Court have fully before it the facts upon which he exercised that discretion. Accordingly, the facts will be stated at some length, in such order as ap-

pears best calculated to make clear the transactions giving rise to this litigation.

A. THE HISTORY OF THE TRANSACTIONS INVOLVED.

Plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of California (Tr. 10, 28). That corporation has been in existence since not later than *January 20th, 1919,* at which time O. H. Root was elected one of its directors, and its vice president (Tr. 57, 58). C. Henry Smith was the general manager of that corporation from the time of its organization (Tr. 50), which, as has just been pointed out, took place not later than *January 20, 1919,* to about *April 21st, 1921* (Tr. 50). Said C. Henry Smith was president of that corporation on *October 9th, 1920* (Tr. 58, 59). Said C. Henry Smith was one of the board of directors of that corporation before he tendered to such board his resignation as a director, on *April 19, 1921.* He was an American citizen (Tr. 64).

On *October 9, 1920* (said C. Henry Smith being then president, general manager and a director of plaintiff corporation, as pointed out above), a meeting of the stockholders of plaintiff corporation was held in San Francisco, at which said C. Henry Smith was present, and the following proceedings, which are quoted from the minutes of that meeting, were had:

> *"It was decided to purchase the Taigi Maru at the price of £18-0-0, Eighteen Pounds Ster-*

ling, per deadweight ton; all cash after steamer has been thoroughly inspected and passes the Bureau Veritas requirements, where the steamer is classed. It was built 1919; is 5453 tons deadweight. She is now in a Bristol Channel Port, having been dry-docked and painted and ready for sea.

"It was also decided to place the steamer under Norwegian flag, and *the ownership of the steamer will be in the name of the California & Oriental Steamship Company,* with a corresponding owner in Norway, according to law there.

California & Oriental Steamship Company,
C. Henry Smith,
President,
O. H. Root,
Vice-President,
G. R. Stack,
Secretary."

(Tr. 58, 59.)

At no other subsequent meeting of the stockholders or directors of the corporation was said action rescinded or modified (Tr. 59).

The steamer "Taigi Maru" was, at the time of said meeting, a vessel registered under the laws of the Empire of Japan, and was owned by citizens of that Empire (Tr. 32, 33).

On *October 23rd, 1920,* said C. Henry Smith wrote to Chr. Barth, *attorney at law,* Christiania, Norway, the following letter (italics ours):

"Referring to my letter of September 25th, I have had, in the meantime, occasion to transfer a steamer to Norwegian flag *which was purchased for friends here* from Japanese own-

ers, names the 'Taigi Maru' or now named 'Pacifico.'

"Inasmuch as all negotiations were carried on by cable I had to appoint a Corresponding owner in Norway in order to avoid any delay to the boat, and *ship-owner, Mr. Arthur H. Mathiesen, Kristiania, has agreed to act as Correspondent for the steamer and* I have so advised the Broker, Messrs. Pinkney & Co., Cardiff, and they are therefore, *sending the necessary* papers to Mr. Mathiesen.

"If you will be willing to attend to the matter *of incorporating the steamer in a Norwegian Company for the owners here,* please send me a cable. I do not know whether your specialty is Admiralty Law, but if you, for any reason, could not handle this matter, probably you could recommend someone to us, by cable. In the meantime, I beg to mention the necessary particulars to follow in this case:

"The owners here of the S. S. 'Pacifico' bought the steamer on a cash basis of £18-0-0 per deadweight ton, or £98,154-0-0, and the capital stock of the company" (i. e. the proposed Norwegian Company) "should be one-half of this amount or £49,077-0-0, or the equivalent amount in Norwegian currency.

"I presume it will be necessary, according to Norwegian Law, to have at least three Norwegian Directors besides myself as I am an American Citizen, and if you in that case should be willing to stand as one of the Directors, I would name my brother, Privisor Arthur Smith, Sarpsborg, besides *Mr. Arthur H. Mathiesen* and I will write him in the matter in the same mail.

"The name of the company should be A/S Pacifico. As to your remuneration, we shall, no doubt, be able to agree on this.

"On account of having been obliged to make the necessary arrangements by cable with *Mr. Mathiesen who will act as Corresponding Owner for the steamer,* we have had no opportunity for drawing up any contract. *As the steamer is owned by a company here,* it would be necessary for me to have some sort of an agreement with Mr. Mathiesen, and I have offered him a remuneration of Kr. 12,000 per year during the time he is standing as Corresponding Owner and the duties will be principally to engage officers whenever any vacancies occur, to make up returns for taxes from statements that we will furnish him from here covering the earnings and expenses; also to attend to the insurance at rates which are no higher than can be obtained from here. *The stock"* (i. e. in the proposed Norwegian company) *"is to be issued in the name of the California & Oriental Steamship Company, San Francisco, California, as this Company is the actual owner of the boat* and the shares to be in denominations of Kr. 6,000 or Kr. 12,000."

"If there are any other points that have not been fully explained, we can easily do so by cable. In the meantime, remain with kind regards" (Tr. 63, 64, 65).

On *October 25th, 1920,* said C. Henry Smith wrote to the Mr. Arthur H. Mathiesen, referred to in the above letter to Chr. Barth, the following letter (italics ours):

"Referring to your cable today, as per copy enclosed, *in which you suggested a limited company be formed according to Norwegian laws,* I telegraphed in reply thereto that *I had already sent full particulars by mail.*

"You will appreciate that on account of the limited time I had to take over this boat, I had

not made any such arrangement and I am very much obliged to you for accepting the proposition I made, *to act as Correspondent for the boat, and I have now written my friend, Advokat Barth, at Kristiania, with regard to this company. I asked Mr. Barth to get in touch with your good self* and as I also thought it would be necessary to have a third Director under Norwegian law, I suggested my brother, Arthur Smith, Sarpborg, *who also will call on you in this connection.*

"I am thankful for the information in your cable that 6/10 of the capital must be owned by Norwegian subjects and *I am writing Advokate Barth with regard to this stipulation.*

"INSURANCE: I beg to confirm cable in which I asked you to cover Kr. 2,000,000 Hull 6% and Interest and Disbursements Kr. 700,000 2¼%. The valuation of the steamer is Kr. 2,600,000, which kindly keep private.

"I have cabled London for rates, but so far have not had any reply as they are very particular about which trade the steamer was to operate, so under the circumstances not having anything definite from London, I accepted your rates on the basis as just mentioned.

"I also appreciate very much that you have engaged three engineers 750, 575 and 480 respectively and three mates 560, 460 and 350 monthly, which is satisfactory and may say that *I had already engaged a Captain through Messrs. Pinkney & Co.* on the basis of Kr. 12,000 per year.

"LOAN WITH MORTGAGE IN STEAMER: I have been in communication with a bank in Norway and also an attorney with regard to a loan and thought possibly you could arrange such a loan with the Skibs-Hyuothek Bank for one-half of the valuation, basis Kr. 2,600,000 and I shall be glad to hear on what terms such a loan can

be obtained and particularly at what rate of interest.

"*Messrs. Pinkney & Co. will be sending you the papers after he has made transfer* and may say that the transfer will be delayed a couple of days on account of the London bills for the balance of the payment being mailed *by our Bank* from New York instead of being telegraphed, but presume that these bills will arrive there not later than Thursday of this week" (Tr. 66, 67).

On or about *October 27th, 1920,* the "Taigi Maru" was purchased from her Japanese owners (Defendants' answer, Tr. 33).

"That upon said purchase being made, said Smith caused said vessel to cease to be registered under the laws of the Empire of Japan and to be registered under the laws of the Kingdom of Norway under the name 'Pacifico', and with one, A. Mathiesen, a citizen of said Kingdom, as the registered owner thereof." (Defendants' answer Tr. 33.)

On *November 3rd, 1920,* immediately upon the "Pacifico" being registered under the Norwegian flag with one A. Mathiesen as registered owner thereof, H. J. Hammer became the master of said vessel, and has been her master since that time (Tr. 49).

"That he was put in possession of said vessel as her master by the firm of Pinkney & Company. That at the time he became master of said vessel he was instructed by said firm to obey and follow all orders and instructions delivered to him by one C. Henry Smith" (Tr. 49).

(*Note*: See above letter of October 25th, 1920, from Smith to Mathiesen.)

On *April 18th, 1921,* C. Henry Smith, at a meeting of the directors of plaintiff corporation tendered his resignation as a member of that board, and his resignation was forthwith accepted (Tr. 59, 60).

On *April 19, 1921,* at a meeting of the directors of plaintiff corporation, C. Henry Smith, who was then present, with the unanimous consent of all of the directors "was directed to send the following telegram to Arthur Mathiesen, corresponding owner, in Kristiania, Norway, to wit:"

> "Inasmuch as steamer 'Pacifico' is owned by California and Oriental Steamship Company please cable declaration that such is the fact that you are the representative of this Company.
>
> (Signed) Smith."

(Tr. 60.)

On *April 20, 1921,* C. Henry Smith complied with said direction and sent said telegram in code (Tr. 60, 61).

It is a fact of the utmost significance, in view of the allegations contained in the answer (Tr. 33) and the affidavit of C. Henry Smith (Tr. 50), to the effect that Mathiesen held the registered ownership of said vessel for "said Smith as the sole beneficial owner, and for no one else," that *he himself sent this telegram.*

On *April 21st, 1921,* C. Henry Smith exhibited to Mr. O. H. Root, vice president and a director of plaintiff corporation, the reply of Arthur Mathiesen (Tr. 61) which was as follows:

> "Referring to your telegram just received Pacifico is actually owned by the California and Oriental Steamship Company. I am registered owner of the steamer and representative of this company (stop) Accordance with your instructions bill of sale has been deposited with the Norsk Hydro Kristiania as security for your debts to them. They are entitled to have clean bill of sale at any time transferred to them" (Tr. 62).

Again, it is a fact of the utmost significance that Mathiesen, so far from protesting that he never heard of plaintiff corporation, or that it was not the owner of the "Pacifico", or that he is not the representative of plaintiff corporation, sent the above telegram.

It then developed that for a considerable period prior to *January 17th, 1921,* defendant Norsk Hydro had engaged in a course of business with said C. Henry Smith, as an individual, whereby it delivered nitrates to C. Henry Smith to be sold by him for it upon a *del credere* commission (defendants' answer Tr. 34).

[*Note*: The Defendants' Answer alleges that Norsk Hydro "had engaged in a course of business with said Smith whereby it *sold* him nitrates manufactured by it to be resold by him, *or* whereby it *delivered* nitrates to be sold *by him for it* upon a

del credere commission" (Tr. 34). The allegation is ambiguous as to which, in fact, was the course of business, and it is proper and reasonable, at least for the purposes of this appeal from the interlocutory order of the District Court appointing a Receiver *pendente lite,* to construe it as has been done above.]

In the course of such business between C. Henry Smith, as an individual, and defendant Norsk Hydro, according to the allegations of the answer, Smith was, on *January 17th, 1921,* and for some time prior thereto, had been, personally indebted to said defendant in a considerable sum (answer, Tr. 35). While Smith was so indebted to it, and prior to *January 17th, 1921,* said defendant refused to deliver further nitrates to Smith without payment therefor upon delivery, unless Smith should pay or adequately secure the account between them (answer Tr. 35).

Thereupon, according to the allegations of the answer, and prior to said *January 17th, 1921,* Smith offered to cause the steamer "Pacifico" to be transferred to said defendant as security for said account, provided the defendant would thereafter continue to deliver nitrates to him without requiring, as a condition precedent, the payment of the purchase price therefor, but would allow such price to be charged against him upon such account (answer Tr. 35). Immediately prior to such *January 17th, 1921,* a consignment of nitrates shipped

by said defendant to Smith was expected to arrive in California. Said defendant refused to deliver to Smith the shipping documents for said consignment, and it arrived and was stored and held for the account of said defendant. Thereafter, but still prior to *January 17th, 1921,* said defendant agreed to the above offer of Smith (answer Tr. 35), and:

> "thereupon, and performance thereof, and on the *17th day of January, 1921,* the said Smith caused said Mathiesen to transfer said vessel to the defendant" (Norsk Hydro) "by the endorsement and delivery to the latter of the bill of sale therefor, and thereupon said defendant, in consideration therefor, caused said consignment of nitrates hereinbefore last mentioned to be delivered to said Smith without payment of the purchase price therefor, charging said purchase price against said Smith upon said open account" (answer, Tr. 36).

The balance due from Smith to said defendant was thus considerably increased, according to the allegations of the answer, and it is alleged that no part of such balance has been paid and the same is due and payable by Smith to said defendant (answer, Tr. 36).

It was on *January 21st, 1921,* and not on *January 17th,* that Mathiesen deposited the bill of sale of the "Pacifico" endorsed in blank, with defendant Norsk Hydro, as appears from a copy of a letter from Mathiesen to the Bank of Italy, dated *June 24, 1921,* which copy had been delivered by Mathiesen to defendant, Norsk Hydro, and was by it introduced in evidence at the hearing herein (Tr.

76-78). In that letter, Mathiesen says, referring to his above quoted telegram to Smith dated *April 21st, 1921* (Tr. 61, 62):

> "I found it, however, at the same time expedient to make a mention of the fact that, according to his" (i. e. Smith's) "instructions, the Bill of Sale which in due course had been received by me, had on the *21st January, 1921,* been deposited in original with The Norsk Hydro Elektrisk Kvaelstof Aktieselskab, endorsed in blank" (Tr. 77; also see Tr. 78).

At some indefinitely disclosed time after *January 21st, 1921,* defendant Norsk Hydro "caused the name of the defendant Eriksen to be inserted as the buyer in said bill of sale, and by virtue of said bill of sale caused the registered ownership of said vessel to be transferred from the said Mathiesen to the said Eriksen (answer Tr. 37).

Defendant Eriksen was the advocate of defendant Norsk Hydro (Tr. 78).

It is most unfortunate that defendants did not see fit to place in evidence the bill of sale bearing the blank endorsement, or a copy of it, or the document by virtue of which the "Pacifico" was registered as belonging to defendant Eriksen, or to definitely disclose the time at which Norsk Hydro caused the name of Eriksen to be inserted as buyer in said bill of sale, or the time at which defendant Eriksen caused said vessel to be registered in his name, or the time when "defendant Eriksen took and received possession of said vessel from said Smith" as alleged in answer (Tr. 37; also Tr. 50).

Defendant Eriksen came to San Francisco as an officer of the Norsk Hydro and in his individual capacity, for the purpose of representing defendants in and about their claims to said steamship (Tr. 17), arriving on or about *July 7th, 1921* (Tr. 69), was served with process in this suit on *July 18th, 1921* (Tr. 70), verified the answer herein on *August 6th, 1921* (Tr. 42), and thereafter made an affidavit in resistance to plaintiff's application for a receiver (Tr. 56, 57). Yet he discloses none of the above mentioned things.

However, the bill of sale bearing the blank endorsement was the original bill of sale to Mathiesen endorsed in blank by him (see *supra* and Tr. 36, 37, 62, 77). And Mathiesen in his wire of *April 21st, 1921* to Smith says that:

> "They" (i. e. Norsk Hydro) "are entitled to have a clean bill of sale at any time transferred to them" (Tr. 62).

And Mathiesen in the copy of his letter dated *June 24th, 1921,* placed in evidence by defendants, says:

> "On the *13th inst.*" (i. e. *June 13th, 1921*) "I received from Norsk Hydro information to the effect that the vessel had under the Bill of Sale deposited with them on the *21st January* been registered as belonging to their advocate, Mr. Bjarne Eriksen, here. I have therefore no longer anything to do with this ship" (Tr. 77, 78).

It is therefore a proper and reasonable inference, at least for the purposes of this appeal from the

interlocutory order of the District Court appointing a receiver *pendente lite* that Norsk Hydro did not cause Eriksen's name to be inserted in the blank endorsement on the original bill of sale to Mathiesen until on or shortly before *June 13th, 1921,* and that the document by virtue of which the "Pacifico" was registered as belonging to defendant Eriksen was neither executed nor filed, until on or shortly before *June 13th, 1921*, and that such document was not the original bill of sale to Mathiesen, endorsed in blank, but a new bill of sale, or similar document.

Moreover, such inference is corroborated by the undisputed facts that after the arrival of the "Pacifico" in San Francisco, on *May 24th, 1921*, Mr. Ferrari, one of the directors of plaintiff, in company with Mr. Blake (concerning whose identity see Tr. 80) went on board of the vessel on *May 25th, 1921* with the necessary money and paid the crew what was due them to that date (Tr. 78, 79, 72); and that after the arrival of said vessel the freight moneys earned by her on her voyage to San Francisco were collected, and the disbursements for said vessel and all other usual expenses paid, by the secretary of plaintiff corporation (Tr. 72); and that prior to *May 31st, 1921* the master of the vessel did not know anything about the Norsk Hydro being the owner of the vessel, but thought that C. Henry Smith (the president, general manager and a director of plaintiff corporation) was the owner of her (Tr. 79). All of these facts

point most convincingly to the fact that it was not until on or shortly before *June 13th, 1921,* the date mentioned in Mathiesen's letter of *June 24th, 1921,* that defendants attempted to actually vest in themselves the legal title to said vessel and have her registered in the name of Ericksen.

These facts are also persuasive of the truth of the allegation (contradicted by defendants, Tr. 43) in the petition for appointment of a receiver *pendente lite* that, up to or about *July 15th, 1921,* the master of said steamer obeyed and followed all orders and instructions of plaintiff corporation, but thereafter failed to do so and complied with those of Norsk Hydro instead (Tr. 23, 24). It is also to be borne in mind, in this connection, that it was not until about *July 7th, 1921,* that defendant Eriksen arrived in San Francisco (Tr. 69), and that defendants do not show, either in their pleadings or proofs, the time when they claim possession of the vessel was transferred to them by C. Henry Smith (Tr. 37, 50).

[*Note.* Defendants, in their brief, attach undue importance to the fact that plaintiff filed a libel *in rem* against the "Pacific" on *May 31st, 1921,* joining C. Henry Smith and the master *in personam,* seven days after her arrival in San Francisco. The history of this admiralty proceeding is fully set out in the affidavit of G. W. Bell (Tr. 68 to 73), to which is attached, as an exhibit, a copy of the answer of C. Henry Smith and the master of the ves-

sel to the libel (Tr. 74, 75). It is to be noted that the libel is essentially a proceeding *in rem*—against the ship and all persons intervening for their interests therein. It is what is known in the admiralty as a "Possessory Action," and is brought for the purpose of quieting possession of the *res*.

> "Actions *in rem,* as a general class, comprehend proceedings which also take the name of distinct actions, as (1) possessory; (2) petitory; (3) forfeiture; and (4) prize."
>
> Betts' Admiralty Practice, 16.

But, under Supreme Court Admiralty Rule 19, in such a suit

> "for the ascertainment of the title and delivery, or for the possession only * * * the process *shall be* by an arrest of the ship *and* by a monition to the adverse party or parties to appear and make answer to the suit."
>
> *267 Federal Reporter, XI.*

Mr. Benedict says that "the process *must be* by an arrest of the ship *and* by a monition."

> *Benedict's Admiralty,* 4th Ed., Sec. 328.

It would be perfectly proper, in such an action to proceed against the ship *in rem* and join wholly formal parties *in personam* to comply with this rule.

The libel of plaintiff corporation was filed to determine the right to possession of said vessel (Tr. 68). The vessel had come into this jurisdiction. Defendants were not in this jurisdiction. Plaintiff had discovered that C. Henry Smith, its president

and general manager, who had employed the master of said vessel and who, presumably, had been exercising authority over him on plaintiff's behalf, had been dealing in some secret and unauthorized manner with its ship. Obviously the plaintiff could not run the risk of its ship disappearing from this jurisdiction overnight, under these disturbing circumstances. It took the only available means of protecting its interest and bringing the whole matter to the light of day, and the information and belief on which its secretary verified the libel, were sufficient to justify joining Smith and the master in the libel against the ship. If they were faithful to plaintiff, no harm would be done, and any one asserting an adverse claim to the ship would appear. If they were serving new masters it was high time to find that out, and no better means existed for determining that question. Their answer to the libel does not allege that either of them was in possession of the vessel or withheld possession from libelant, or that either of them claimed title to possession of her. It is as non-commital as it could well be made. The answer was not filed until *July 11th, 1921,* though the libel was filed on *May 31st, 1921.* By that time the libel had brought defendants into this jurisdiction (Tr. 17, 69), plaintiff had gathered something of what had been transpiring behind its back, and filed its complaint herein on Saturday, *July 16th, 1921* and served Mr. Ericksen with process on the following Monday, *July 18th, 1921* (Tr. 70). It may be remarked that

defendants "submitted" to the jurisdiction of the District Court in the present case, as stated in their brief (p. 25) only because Mr. Ericksen was served with process here and they had no alternative.

Plaintiff does not object to the consideration of the libel proceeding as one of the circumstances bearing upon who was in possession of the "Pacifico", but in no sense can it be taken, as defendants seem to urge that it be taken, as a conclusive admission in this case that plaintiff corporation was not in possession of the vessel after *May 31st, 1921* —particularly when the answer to the libel is taken into consideration, and the other circumstances hereinabove mentioned.]

To resume, after the above parenthetical remarks: In *February, 1921,* the book account for the "Pacifico" which heretofore had been entitled "Pacifico", was changed by writing the name California & Oriental Steamship Company above it.

> "That was done by Mr. Blake after a talk with C. Henry Smith. Mr. Blake is the bookkeeper" (Tr. 80).

The uncontroverted allegations of the complaint establish the fact that none of the acts of Smith or Mathiesen or defendants, relating to the attempted transfer of the "Pacifico" to the defendants were directed or authorized by plaintiff corporation; and the fact that all of such acts were done without the knowledge or consent of plaintiff corporation, and the fact that none of such acts was done for

the account, benefit or use of said corporation, and it derived no benefit therefrom (Tr. 15, 16); and the fact that said steamer was never operated by or at the expense or for the account of Mathiesen, and that at no time has said Mathiesen claimed to operate her, or that she was being operated for his account (Tr. 12, 13).

It is admitted by the answer that defendants *knew when they were dealing with Mathiesen and Smith that Mathiesen was not the beneficial owner of the "Pacifico", but held her in trust* (Tr. 36, 29, 34). But they claim that they *believed* that C. Henry Smith was the cestui que trust under that trust, and

> "That *until* long after the occurrence of the matters alleged in the last preceding subdivisions of this Answer" (i. e. subdivision II, Tr. 34-36), "neither of the defendants *had notice or knowledge that said Smith was not the sole beneficial owner of said vessel,* and had no notice or knowledge of facts or circumstances which would have put a reasonably prudent man upon inquiry as to his ownership" (Tr. 36).

Plaintiff, on the other hand, claims that defendants, in their dealings with Mathiesen and Smith, knew and had notice, or had information which was sufficient to put a prudent man upon inquiry which would have led to the knowledge and notice that Mathiesen was trustee of said vessel for plaintiff corporation, and that defendants are mere volunteers (Tr. 14, 15, 16).

Defendants do not claim to be purchasers of the "Pacifico", but claim that they hold her *as mortgagees as security* to secure the alleged personal indebtedness of Smith arising out of their *del credere* nitrate transactions (answer, Tr. 35, 37; defendants' brief, 34).

The complaint alleges the value of the "Pacifico" to be in excess of $350,000 (Tr. 18). The answer denies that she is of a present value approximating that amount (Tr. 32).

There remains to be mentioned, before proceeding to point out the equities of the petition for appointment of a receiver *pendente lite,* the astonishing attempt of C. Henry Smith to wholly ignore the plaintiff corporation as the purchaser of the "Pacifico", in his affidavit on behalf of defendants (Tr. 50, 56). He says that, on *October 9th, 1920,* the very day on which the resolutions (Tr. 58, 59), quoted above, were passed at a meeting of the stockholders in plaintiff corporation at which C. Henry Smith was present in person, and the minutes of which he signed as president of plaintiff, he and

> "certain other individuals" (unnamed) "agreed to associate themselves together in a corporation to be organized under the laws of Norway, for the purpose of purchasing the steamship 'Pacifico'. * * * That for the purposes of convenience it was agreed by affiant and said individuals to use plaintiff as a temporary organization representing their association, together in the enterprise of purchasing and owning said vessel, but plaintiff itself was not to

have any interest in said vessel. That said individuals agreed to contribute $60,000 toward the purchase price of said vessel. * * * That the total purchase price of said vessel with the stores and materials upon her, was approximately $350,000. That it was agreed between said individuals and affiant that the actual purchasing of said vessel and its operation thereafter should be done by affiant, and that a portion of the purchase price should or might be obtained by mortgaging the vessel. That affiant did purchase said vessel from her Japanese owners, but instead of mortgaging said vessel to obtain a portion of the purchase price, he actually paid the full purchase price, to wit, approximately $350,000 with his own funds. That thereafter said individuals, through the instrumentality of the plaintiff, paid affiant the $60,000 which they had agreed to contribute toward the purchase price of said vessel as hereinbefore set forth, but with the exception of said $60,000, affiant has not been reimbursed, and there has not been repaid or tendered to him any part of the purchase price of said vessel so paid by him with his own funds" (Tr. 51, 52).

In view of the above quoted resolutions (Tr. 58, 59), signed by C. Henry Smith, and of his above quoted letters to Chr. Barth and Arthur Mathiesen (Tr. 63-67), his wire to Mathiesen and the latter's reply (Tr. 61, 62), quoted above, to say nothing of the other matters mentioned herein, these statements cannot be given credence, and such must have been the impression made by them on the mind of the Judge below.

This bold attempt to disregard the corporate entity of plaintiff, moreover, as a matter of law,

could never be countenanced by any Court. Courts will sometimes disregard the corporate fiction to prevent or relieve against fraud, but no Court could disregard the corporate entity for the purpose of assisting one to succeed in the course of conduct which the record in this case shows C. Henry Smith to have pursued. A Court of Equity, in particular, cannot countenance such a course of conduct.

Either these statements in the affidavit of C. Henry Smith, and likewise the verbatim allegations in the answer (Tr. 37-40) must be wholly disregarded, or the Court must take them to be C. Henry Smith's lay conception of the relationship existing between a corporation, its stockholders and the corporate property as being that the stockholders are the direct owners of the property in proportion to their stock-holdings, and the corporation is simply a convenient repository for such property. The fact is that the corporation as an entity bought and owned the "Pacifico", separate and apart from its stockholders, and Smith was necessarily a stockholder, since he was president and a director of plaintiff corporation. The same is probably true of the "individuals" to whom C. Henry Smith refers. Or the Court, as another alternative, may take these statements as indicating the inception of a scheme to ultimately accomplish the transfer of the vessel behind the plaintiff's back.

In any event C. Henry Smith's conclusions as to the matter, as stated in his affidavit made after this

litigation had been commenced, cannot override the very minutes of the stockholders' meeting which he signed, or the statements in his letter to Chr. Barth, contemporaneous with the purchase of the ship—particularly: "As the steamer is owned by a company here" (Tr. 65), and "The stock" (i. e. in the proposed Norwegian company) "is to be issued in the name of the California & Oriental Steamship Company, San Francisco, California, as this company is the actual owner of the boat" (Tr. 65), —or the statement in the telegram which he later sent to Mathiesen, without protest: "Inasmuch as steamer 'Pacifico' is owned by California and Oriental Steamship Company" (Tr. 61).

To these observations defendants will reply (defendants' brief p. 12) by saying that plaintiff has not controverted the statements in C. Henry Smith's affidavit. It has been just pointed out that plaintiff has done so. If defendants go further, and say that they should have been controverted in greater detail, the answer is that that is the exact province of the final hearing of this case. Indeed the very words of defendants' brief, concerning the first defense in their answer may also be here applied: "the facts appearing in the pleadings and affidavits on both sides are such that we would not be justified in saying positively that the lower court might not reasonably conclude that there was a fair probability of the plaintiff establishing that a trust existed as to Mathiesen in favor of plaintiff", since that is the whole sum and substance of the above allega-

tions in C. Henry Smith's affidavit, and, consequently, of the information-and-belief third defense to the complaint (defendants' brief pp. 11, 12, 13; Tr. 37, 38, 39).

B. THE GROUNDS AND EQUITIES OF THE PETITION FOR APPOINTMENT OF A RECEIVER PENDENTE LITE.

The defendants are mistaken in saying that the sole ground on which the appointment of a receiver was petitioned for is that just before the commencement of the action the plaintiff was dispossessed of the vessel by the defendants (defendants' brief p. 20).

The petition expressly refers to the allegations of the complaint and by reference incorporates them in the petition as fully in all respects as though again set out in the petition (Tr. 23). It would have seemed only to uselessly encumber the record to physically repeat in the petition the allegations of the complaint.

The grounds and equities for the appointment of the receiver *pendente lite,* are briefly, the following:

1. The constructive trust in defendants by virtue of their acquisition of a trust res, the "Pacifico" from a trustee, Mathiesen, as volunteers with actual or constructive notice that he held her in trust solely for plaintiff and that plaintiff was the sole beneficial owner and solely entitled to the possession and use of her (Tr. 13-18).

2. The hostile claims of defendants to the "Pacifico", which constitute such a cloud on the title and equities of plaintiff and its right to the possession of her as to render operation and use of her by plaintiff impossible pending the determination of the rights of the parties to this suit (Tr. 16, 17, 24).

3. Absence of adequate remedy at law or in admiralty (Tr. 18).

4. Threatened removal of the "Pacifico" from this jurisdiction (Tr. 18, 24) the complaint clearly alleging that both defendants are citizens of Norway (Tr. 10, 11) and that the "Pacifico" is under Norwegian registry (Tr. 11).

5. Threatened subjection of the "Pacifico" to the risk of loss and destruction by perils of the sea and accidents and disasters of navigation while being used by defendants for their own benefit, to the irreparable injury of plaintiff (Tr. 18).

6. The fact that the "Pacifico" is an article of personal property of a special kind, and of unique and individual character, and of special value to plaintiff, and cannot be replaced and her value cannot be estimated or computed with certainty (Tr. 18).

7. The necessity of conserving the "Pacifico" pending final adjudication of the rights of the parties hereto (Tr. 24, 25).

8. Serious depreciation of the "Pacifico" her apparel and equipment by virtue of non-usage, pending final termination of this cause (Tr. 25).

II.

The Argument.

A. THE SOLE QUESTION UPON THIS APPEAL IS WHETHER THE DISTRICT JUDGE IMPROVIDENTLY EXERCISED OR ABUSED HIS JUDICIAL DISCRETION IN MAKING THE INTERLOCUTORY ORDER APPOINTING A RECEIVER PENDENTE LITE.

This proposition is not subject to dispute. It will now be pointed out how broad is the scope of the discretion of the lower Court, and how loath an Appellate Court is to review the exercise of that discretion.

The Supreme Court has stated the rule in language peculiarly applicable to the case at bar:

> "The only doubt which the Court could have on the question arises from the principle that the appointment and discharge of a receiver are ordinarily matters of discretion in the Circuit Court, with which this Court will not interfere.
>
> "As a general rule, this proposition is not denied. But we do not think it applicable to the case before us. While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the origin of that debt, the appointment, or the discharge of a receiver of the mortgaged property, very properly belonged to the discretion of

> the Court in which the litigation was pending. But when those questions had been passed upon by the Circuit Court, and by this Court also on appeal, and the amount of the debt definitely fixed by this Court, the right of the defendant to pay that sum, and have a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the Circuit Court."
>
> *The Milwaukee & Minn. Ry. Co. v. Soutter,* 17 Law Ed. 900 at 904.

In the case at bar the parties to this suit are still fiercely litigating their respective rights to the steamer "Pacifico", and questions of fraud in the origin of the rights of the defendants. No more equitable disposition of the subject matter of that litigation could have been devised than the appointment of a receiver to preserve and operate it for the account of whom it might concern, pending the final termination of this suit.

The same principles which apply to appeals from interlocutory orders granting temporary injunctions obviously apply to appeals from interlocutory orders appointing receivers *pendente lite.* This Honorable Court through Mr. Justice Gilbert concisely stated the rule as follows:

> "The granting or refusing of a preliminary injunction in such a suit ordinarily rests in the sound discretion of the trial court, and the review thereof by the Appellate Court is limited to the inquiry whether there was an abuse of discretion in granting a writ. This rule has been so often applied by this Court, and is so

well established by precedent as to require the citation of no authorities."

Kings County Raisin Co. v. Raisin Co., 182 Fed. 60, and

Worder Mfg. Co. v. Block, 249 Fed. 750.

On an appeal from an interlocutory order it will of course be presumed that the evidence was sufficient to justify the decree appealed from, unless this record clearly shows to the contrary, and the Appellate Court will not review disputed questions of fact arising from contradictory affidavits.

King Lumber Co. v. Benton, supra;

Railroad Comm. v. Rosenbaum, 130 Fed. 110;

Kerr v. New Orleans, 126 Fed. 920.

The District Judge Wisely Exercised His Judicial Discretion to Preserve the Existing Status Pending Final Adjudication.

Bearing in mind the language of the Supreme Court in the Milwaukee & Minnesota Railway case, above quoted, the following language of the Circuit Court of Appeals for the Fifth Circuit is exactly applicable to the present case:

"When issues are joined raising grave questions of law which the Court must decide before rendering a final decree, it is then within sound judicial discretion to preserve the existing status till the case is finally decided."

King Lumber Co. v. Benton, 186 Fed. 458 at 459.

It is apparent from the record in the instant case that the issues, and in particular the fourth defense pleaded in the answer, raise very grave and complicated questions, not only of our own law, but also of the law of the Kingdom of Norway, which the lower Court must decide before rendering a final decree. In fact, the District Judge below made that very comment from the bench when counsel were arguing concerning the fourth defense in the answer. Moreover no Court would be justified in even attempting to pass upon or determine the merits of the fourth defense of the answer upon the basis of the pamphlet which was introduced by defendants purporting to be published at Christiania, Norway, and entitled "Collection of Norway Laws Published for the Use of the Legations and Consulates 1916-1920".

The appointment of a receiver in the case at bar was necessary in order to at the same time preserve the existing status and yet not uselessly keep the "Pacifico" lying idle in San Francisco Harbor. Defendants' brief (p. 16) states that the remedy of a receiver "is more drastic than the remedy of an injunction *pendente lite* which but stays action by defendant for the purpose of preserving the *statu quo*". Obviously that is not true of the case at bar. Had the lower Court issued an injunction, enjoining the removal of the "Pacifico" from this jurisdiction, and so kept the ship idle, its discretion might well have been open to serious question. The obviously safe, practical and equitable thing to do was

not to allow her to be operated or removed from the jurisdiction by either party during the determination of their respective rights, but to have her operated for the account of the party who might be ultimately concerned, by a receiver under adequate bonds, so that she would at all times be in the custody of the Court. Moreover, the allegation, contained in the plaintiff's petition for a receiver, that the steamer and her equipment are subject to serious depreciation through non-usage is nowhere denied, and must therefore be taken as true.

It is obvious from the facts that plaintiff had no remedy at law or in admiralty, Mathiesen being a trustee of the vessel for it, and that the District Court had complete jurisdiction of all necessary parties and of the subject matter of the trust. Obviously it would be most improvident to allow the very subject matter of this litigation, a ship claimed by foreign defendants, and under foreign registry, to be removed from its jurisdiction, unless in charge of a custodian for the court. Such threatened removal from the jurisdiction is clearly 'adequate justification for a Court of Equity to act. One of the usual statutory grounds for appointing a receiver is the danger of property "being lost, removed or materially injured".

Code of Civil Procedure, Sec. 564.

And in so far as State statutes authorize the appointment of receivers they will be followed by the Federal Courts.

Foster Federal Practice, p. 940.

A receiver may be appointed to provide for the safety of property pending litigation to determine title to it.

Foster Federal Practice, p. 937.

Were the ship here involved allowed to be removed from the jurisdiction by defendants, they might well see to it that neither she nor they were in this jurisdiction upon the final determination of this controversy. The plaintiff, if successful in establishing its right to her, would then, at best, be relegated to doubtful relief in a distant and foreign jurisdiction, and would find in its remedy only the seed of new litigation.

Moreover a ship is an article of personal property of a special kind, and of unique and individual character, and her value is not capable of certain computation. Courts of equity, both in this country and in England, upon that ground, have decreed specific performance of contracts for the sale of ships.

Menier v. Donald, 165 N. Y. Supp. 50 (collecting authorities, p. 51);

Batthyany v. Bouch, 4 Asp. 380.

Once out of this jurisdiction defendants could so keep the "Pacifico" moving from place to place as to make it impossible, as a practical matter, for plaintiff to follow her to effectively enforce a decree of this Court in plaintiff's favor. And she well might be lost by a peril of the sea, while being operated for defendants' benefit—in which event

plaintiff would forever lose this unique and special object of personal property, and so the very goal of this litigation. To allow defendants to expose her to the risk of such perils during this litigation would be most improvident. The argument in defendants' brief to the effect that she is being exposed to such perils by the receiver is specious, because that risk contains the possibility of benefit to plaintiff, whereas operation of her by defendants for their own benefit would be without possibility of benefit to plaintiff.

This leads to the consideration of the protest in defendants' brief that a great hardship was worked upon them by reason of being deprived of the "Pacifico" by this receivership. That protest is sound rather than substance, for it does not appear that defendants were ever entitled to *possession* of the ship, since they admit that they were only mortgagees of her (defendants' brief 34). It does appear that plaintiff collected and disbursed the freights of the vessel on her arrival in San Francisco on *May 24th, 1921.* So whatever possession defendants ever acquired of the ship was acquired very shortly before this suit was filed, and they do not show by their answer or proofs that they will suffer any damage through the operation of this ship by the receiver. The most they attempt to show in this respect is that they *prefer* to operate her themselves.

That the defendants are not in fact prejudiced by the receivership in any way is no more con-

clusively shown than by their refusal to accept the fair and lenient alternative which the District Court offered them, of furnishing a bond conditioned that defendants would abide by and perform all orders and decrees which might be rendered in this suit, and would return the ship to this jurisdiction to abide by and perform the final decree in this cause in the event it should be in favor of plaintiff (Tr. 34). If defendants really desired to themselves operate the vessel, if they had any real or serious objection to her operation by a receiver, here was a simple and equitable manner by which they could do so. All they had to do was to give assurance that they would abide the decree herein and return the ship to this jurisdiction in the event of a final decision for plaintiff. The very fact that these foreign defendants, desiring possession of the foreign registered ship, were unwilling to accept this eminently fair alternative could not but make the District Court the less inclined to let the vessel go out of its jurisdiction. It constitutes a conclusive ground for refusal by this Court to overrule the exercise of the discretion of the experienced District Judge:

> "The case is now in the hands of the learned judge below, who heard it upon the merits, and who states in his opinion granting the preliminary injunction that his purpose is to look into the subject anew, and form an individual judgment of his own. We are entitled to the benefit of his views upon the serious question whether or not the defendants' machines infringe the patent in suit, and upon the merits

of the case generally under the plenary proofs. We therefore will confine ourselves to the single question whether or not the court erred in granting the preliminary injunction. Having regard to the special circumstances, and in view of the proofs to sustain the motion for a preliminary injunction, we are not prepared to hold that the order complained of was improvidently made. *The condition for security imposed upon the complainants and the privilege accorded to the defendants to dissolve the injunction by giving counter security show a cautious exercise by the court of its legal discretion.* We are not convinced that the court erred in granting the preliminary injunction upon the terms prescribed. Therefore, and without intending to intimate any opinion as to the final rights of the parties, we affirm the interlocutory order."

American Fur Co. v. Cimiotti Co., 118 Fed. 839.

In a case where an injunction *pendente lite* was granted, the District Court provided in its order that it should "not issue in case defendants file a bond for $10,000, with satisfactory sureties, within ten days from date hereof, to secure complainant in that amount for future damages upon final decree which may hereafter be awarded against them". The Circuit Court of Appeals, on an appeal from this interlocutory order, refused to go into the matter and affirmed the order, saying:

"Upon the record presented it is not altogether clear that complainant was entitled, in advance of final hearing, to an injunction immediately stopping manufacture and sale of the devices complained of. *The order below has not*

> *interfered with such manufacture and sale, but has only required defendant to give security to respondent, in the event of complainant's ultimate success, for whatever interim damages may accrue.* Such security has been given, and defendant's business remains undisturbed. We do not feel disposed to modify such order, nor to discuss the issues presented here on ex parte affidavits in an opinion which might constrain the judge to whom at final hearing the same issues may be differently presented."
>
> *United Stove Co. v. Silver & Co.,* 128 Fed. 925.

The fact that in that case the alternative was accepted is no distinction in principle.

It is to be always borne in mind, as heretofore pointed out, that the master of the "Pacifico" never heard of the defendants before *May 31st, 1921,* the day the libel was filed against her (Tr. 79), that plaintiff collected the freights and disbursed the ship on her arrival here on *May 24th, 1921,* that, from the copy of the letter delivered to defendants by Mathiesen, dated *June 24th, 1921* (Tr. 76-78), and the other circumstances heretofore adverted to, it would appear that it was only on or about *June 13th, 1921,* that Norsk Hydro placed the name of Eriksen on the bill of sale and had the vessel registered in his name. So it would seem that the remarks and authorities on page 18 of defendants' brief would lead to just the opposite conclusion from that at which they arrive.

B. CONSIDERATION OF POINTS IN DEFENDANTS' BRIEF.

It is respectfully submitted that what has been said to this point is amply sufficient to show that this Court should affirm the discretionary order of the experienced and able Equity Judge who made it. It is already apparent to this Court that Mathiesen was trustee of the "Pacifico" for plaintiff, that he breached that trust and that the utmost the defendants can *even claim* is that they are mortgagees to secure past and present advances made to C. Henry Smith in his personal capacity with full notice that Mathiesen was a trustee, but without *actual* notice that plaintiff was the *cestui* under that trust.

The general principles governing constructive trusts are familiar to this Court. The following are concise and correct statements:

> It is a universal rule, that if a man purchases property of a trustee, with notice of the trust, he shall be charged with the same trust in respect to the property as the trustee from whom he purchased. And even if he pays a valuable consideration, with notice of the equitable rights of a third person, he shall hold the property subject to the equitable interests of such person. Of course a mere *volunteer,* or person who takes the property without paying a valuable consideration, will hold it charged with all the trusts to which it is subject, whether he have notice or not; for in such case no wrong or pecuniary loss can fall upon him, in compelling him to execute the trust to which the property that came to him without consideration was subject.
>
> *Gilbert v. Sleeper,* 71 Cal. 293.

> Where a trustee violates or abuses his trust, the cestui que trust has the option to follow the trust property, or that which is substituted for it, and he may subject the latter, in the hands of a voluntary grantee or purchaser with notice, to the discharge of the trust originally imposed upon the trust property.
>
> *M'Clellan v. Pyeatt,* 66 Fed. 845 at 846.

1. Defendants Were Not Bona Fide Purchasers for Value Without Notice, but Were Volunteers with Notice (Defendants' Brief 26).

They were not bona fide purchasers for value without notice because they knew Mathiesen only held the "Pacifico" as a trustee.

We ask the Court to carefully review what was said above under the heading "History of the Transactions Involved" about the personal dealings of C. Henry Smith with defendants relating to nitrates.

It is apparent therefrom that the greater part of any consideration for the ship was, at best, antecedent and past. It is also apparent—or at least open to such serious doubt that it should be passed upon after final hearing—that Mathiesen did not make any transfer of the "Pacifico" to defendants in *January, 1921.* What he evidently did was to endorse in blank the original bill of sale running from the original Japanese owners to himself, and deliver it to Norsk Hydro. It clearly appears from Mathiesen's wire of April 21st, 1921 (Tr. 62), that whatever document was delivered to Norsk Hydro at that time *was not a conveyance*

of the "Pacifico", but was a mere deposit of a document "as security" for Smith's indebtedness. For Mathiesen adds his conclusion:

> "They are entitled to have a *clean* bill of sale at any time transferred to them" (Tr. 62).

When or how Norsk Hydro "caused" Eriksen's name to be inserted in the blank endorsement does not appear, or when or how or by means of what document Norsk Hydro "*caused* the registered ownership of said vessel to be transferred *from the said Mathiesen* to said Eriksen" (answer, Tr. 37) does not appear. From all of the circumstances, as set forth under the said above heading, it is a fair inference, for the purposes of this appeal, that not long before June 13th defendants received from Mathiesen a "*clean* bill of sale" in order to acquire the legal estate. Therefore at the time defendants received the conveyance, defendants were not purchasers for value and were therefore purchasers *with notice:*

> "NOTICE BEFORE CONVEYANCE OF THE LEGAL TITLE.—A purchaser is *not protected* from a prior equity if he receives notice of it at any time *before the conveyance is executed, even though he may have paid the purchase money before notice.*" (Citing numerous cases.)
>
> *Ames Cases on Trusts,* 2d Ed., note, p. 288.

> "In order that one may claim protection as a *bona fide* purchaser, the money must have been actually paid *and the conveyance taken* before notice of the trust. If the money is secured, *but not paid,* notice of the trust will convert the purchaser into a trustee, and so if the

money is paid, *but the conveyance is not executed, the weight of authority is that notice of the trust will destroy the protection of the purchaser.* * * * And so, if he has paid his money *but has not yet taken the title when he receives notice,* he takes the title subject to all of the equities that attach to it *when the conveyance is actually made to him, as he then has a right to refuse the conveyance and to demand back his money."*

Perry on Trusts, 6 Ed., Sec. 221.

Moreover, as pointed out above, under "The History of the Transactions Involved", in the course of business between Norsk Hydro and C. Henry Smith, defendants *"delivered* nitrates to be sold *by him for it* upon a *del credere* commission" (Tr. 34). That means that Smith received nitrates which he was to sell for *Norsk Hydro* to third parties, and that Smith guaranteed payment *by such third parties* of the purchase price. A *"del credere* commission" is an additional compensation allowed to a commission merchant or factor in consideration of his *guarantying the payment to his principal of the debt due from the buyer for goods sold by such factor or commission merchant.*

Duguid v. Edwards, 50 Barb. 288, 296;
Loeb v. Hellman, 83 N. Y. 601, 603;
Ruffner v. Hewitt, 7 W. Va., 585, 604.

It does not appear from the record that the purchasers who bought the nitrates from Norsk Hydro through Smith have not paid the full purchase price therefor, or that all of such nitrates have been sold.

True, the answer states that Smith "became indebted", but this is a mere conclusion of law. Hence defendants, at least for the purpose of this appeal, are not purchasers *for value.*

Furthermore, as has been pointed out above, when defendants took from Mathiesen whatever documents they did take, they *admittedly knew that he was trustee of the "Pacifico".* They, therefore, had notice that there was a trust, and they cannot found any right arising out of absence of notice upon the contention that they *thought* someone was the cestui of that trust who was *not so in fact.* Defendants' contention would lead to this result: A is trustee of property for B. C, a friend of A, arranges with A that C will establish an open account with D, and instead of paying it, A will transfer to D the trust property. A does so, D knowing that A holds the property in trust, but supposing that he held it for C. No more dangerous principle could be suggested than to say that D takes free from the trust. This Honorable Court, speaking through Mr. Justice Gilbert, clearly summarizes the principles which protect the innocent cestui, B:

> "There can be no doubt that the use of the *word 'trustee'* in the conveyance to T. J. Watson was sufficient to put all subsequent purchasers from him *upon inquiry as to the existence and nature of the trust.* Railroad Co. v. Durant, 95 U. S. 576, 24 L. Ed. 391; Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Covington v. Anderson, 16 Lea (Tenn.) 310. The rule applicable to such a case is well expressed by the Circuit Court of Appeals for the

Eighth Circuit in Geyser Marion Gold Min. Co. v. Stark, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684, in which it was said of the use of the word 'trustee':

"'It is a *warning and declaration* to every one who reads it (1) that the person so named is not the owner of the property to which it relates; (2) that he holds it for the use and benefit of another; and (3) that he has no right or power to sell or dispose of it without the assent of his cestui que trust. It denies the equitable ownership and beneficial interest of the party to whom it is applied, and asserts that he holds it in a representative capacity. It signifies the opposite of the word 'owner', and means that, while the party called 'trustee' has the naked legal title, he has no beneficial right, title, or interest in the property. * * * Hence the legal presumption is that a trustee has no power to sell or convey the property which he holds in his fiduciary capacity, and the fact that he holds it as trustee is a warning and a declaration to all the world that he is without the power of disposition unless that power is specifically, given by the instrument creating the trust, or by the assent of those whom he represents. The legal presumption is that a trustee has no power of sale. Jaudon v. Bank, Fed. Cas. No. 7, 230; Gaston v. Bank, 29, N. J. Eq. 98, 103; Duncan v. Jaudon, 15 Wall. 165, 175, 21 L. Ed. 142.'

"The mortgagee of the mortgage made by Watson and all subsequent purchasers were bound to exercise reasonable diligence to ascertain whether or not the equitable owners of this real estate had authorized the execution of a mortgage. *The investigation and inquiry that were made fall far short of what the law requires.* No inquiry whatever appears to have been made by the original mortgagee or by his assignee, nor by any of the purchasers, until the purchase which was made by the defendant

> Batchelder. The extent of his investigation was to ascertain that no declaration of trust was of record, *and to inquire of the grantor of Watson, who informed him that he did not know that the word 'trustee' was in the deed, and of Milton W. Smith, the attorney for the person from whom he purchased, who informed him that he knew of no one having any claim on the property. No inquiry was made of T. J. Watson, and no effort, so far as the testimony shows, was made to communicate with him. He, of all persons whose names appeared on the records, best knew the facts, and the contingency that he might have denied the trust was no excuse for failure to make inquiry of him.*"
>
> *Sternfels v. Watson,* 139 Fed. 505-507.

The citation of further authorities is unnecessary. In the case at bar there is not even an *allegation,* let alone an iota of evidence, showing or even tending to show that defendants or either of them *ever asked Mathiesen who was the cestui of his trust* of the vessel, or whether, if C. Henry Smith was interested, there was also someone else interested. In the above case decided by this Honorable Court, it was held that although the purchaser investigated and found that the trust was not of record, and although he made inquiry of a grantor of the property, and of the attorney for the person from whom he purchased, the purchaser took the property subject to the trust of which he did not know. It *held* that the least he should have done was to make inquiry of the *trustee himself,* and that the contingency that the trustee *might* have denied the trust was no excuse for failure to make inquiry of him.

The Court cites the leading English case of *Jones v. Williams,* 24 Beav. 47, for this proposition. In that case a mortgagee knew that there were "charges" affecting the property. He made inquiry and discovered *two* charges, but no more. There was *another.* The Court held that he could not claim to be a purchaser without notice of such other charge, *and that he was bound to inquire whether there were any others, and that where he made no inquiry it could not be surmised that a false answer would have been given if an inquiry had been made, or such an answer as would have precluded the necessity for any further inquiry.*

It is apparent from these authorities that, at least in this jurisdiction, B, in the case above supposed, would be protected as against D. D, knowing A was a trustee, was at least at his peril to inquire of A for whom he held as cestui. In the case at bar defendants were at their peril to at least inquire of Mathiesen, who was the cestui of his trust, and defendants will not now be heard to *surmise* that if they had inquired of Mathiesen he would have replied that C. Henry Smith was the cestui.

2. The Plaintiff Is Entitled to Recover Without Paying or Offering to Pay Anything (Defendants' Brief 35).

It has been shown above under the heading "The History of the Transactions Involved", that the foundation in the record on which defendants build the argument under Division III of their brief (p. 35) will not support it. The allegations of the an-

swer on which this argument are based are on information and belief, only and the only support in the record for them is to be found in the verbatim statements in the affidavit of C. Henry Smith (defendants' brief 11, 12). As has been pointed out, the facts in that affidavit are not entitled to credence, and hence the same is true of the information —and—belief allegations in the answer.

But, even admitting those allegations for the purpose of argument, one of them is: *"That plaintiff itself was not to have any interest in said vessel"* (Tr. 37). And in the first defense to the complaint, which defendants *for the purpose of this appeal only,* abandon (defendants' brief 6), but which, as evidentiary matter is inextricably interwoven with the third defense, defendants positively deny that Mathiesen ever held the vessel in trust for plaintiff. And in the second defense it is positively alleged:

> "That said A. Mathiesen accepted and held the registered ownership of said vessel as aforesaid *in trust for said Smith* as the sole beneficial owner and for no one else" (Tr. 33).

How, in view of these facts, defendants can now contend that plaintiff, as a condition precedent to the relief sought in this case, must make tender to them of money *which both defendants and Smith still assert was not advanced for plaintiff's account,* is incomprehensible. It is the less comprehensible in view of the fact that defendants' position is that, *so far as the receivership pendente lite is concerned* they abandon the contention that Smith was in fact

the cestui of the trust, but not the right to make that contention *on final hearing* (defendants' brief 6, 7).

In short, defendants say, in one breath, 'if you had offered to pay us we would have refused it, because Mathiesen never held the vessel in trust for you, and on final hearing we will show that fact, but, useless as tender may have been, you should have made it.' But that will not do. It is axiomatic in law that one is excused from tendering performance when the other party, by word or conduct, says in advance that a tender would not be accepted. Equity, likewise will not require the doing of a useless act.

The astuteness with which the District Judge exercised his discretion is thus again demonstrated, for he said that such rights as Smith or defendants might have, in the event of the plaintiff establishing on final hearing that Mathiesen was in fact trustee for plaintiff, and that defendants were not bona fide purchasers for value without notice, could be protected by the final decree, which could be so moulded as to require payment by the plaintiff as a condition of recovering the vessel, should that prove proper (defendants' brief 38, 39).

Moreover, it is to be borne in mind that, as pointed out heretofore, the record does not show that defendants ever contemplated *possession* of the "Pacifico"—any more than a mortgagee of real property contemplates having possession of the

mortgaged property. And, so far as the alleged advance of Smith to plaintiff is concerned, *assuming* that plaintiff under any circumstances was to pay to him funds which he put into the vessel, plaintiff no doubt expected and contemplated *to earn the funds necessary to make that repayment by having the possession and use of the vessel*—just as a farmer who mortgages his farm, expects to pay the mortgage through the earnings he receives through using the farm.

3. The Trust Which Plaintiff Is Seeking to Enforce Is Not One Illegal Under the Norwegian Law, Nor Is the Transfer Which the Plaintiff Seeks to Compel Prohibited by that Law (Defendants' brief, 42).

This contention of defendants merits no attention on this appeal. When it was advanced in the District Court the Judge said that so complicated a matter could only be passed on at the final hearing. This is in accord with what was said in *King Lumber Co. v. Benton,* quoted supra. So far from being a ground for reversing the discretionary order of the lower Court, the obviously difficult questions involved are a ground for commending that order.

It is not to be presumed that Mathiesen, or plaintiff, or Smith breached, or intended to breach the laws of Norway. Moreover it is apparent from the record that they did not intend in fact to do so. The resolution of the stockholders' meeting signed by Smith on *October 9th, 1920,* specifically recited that the purchase of the steamer and the holding

of her by a corresponding owner in Norway was to be *"according to law there"* (Tr. 59). The letter from Smith to Barth on *October 23d, 1920,* clearly shows that the parties intended to comply with the Norwegian law in having a Norwegian hold the registered ownership of the vessel for an American corporation—particularly as Barth was a *Norwegian attorney* (Tr. 63-65). The same thing is true of the letter from Smith to Mathiesen dated October 25, 1920 (Tr. 66). Mathiesen, as is apparent from the facts referred to in Smith's letter to him on *October 25th, 1920,* would not have taken the title to the vessel if doing so had constituted a breach of Norwegian law.

Referring to the sections of the Norwegian pamphlet referred to in defendants' brief pages 43 and 44, it is to be noted that *Sec. 2* expressly provides that the "government department concerned *may grant dispensation from the prohibition provided by Sec. 1".* It is not to be assumed for a moment that the government department would not grant dispensation from such prohibition under the circumstances involved in the case at bar, where the *res* involved in the trust in dispute is within the territorial jurisdiction of this Court, and where all of the parties interested in the litigation have been properly served in this jurisdiction and are before this Court. The title and disposition of personal property is governed by the law of its *situs,* as is well established and any theoretical *situs* at-

tached to domicile surrenders to actual *situs* where justice and convenience demand it.

> *New Orleans v. Stempel,* 44 Law Ed. U. S. 174 at 179.

In the present case the actual *situs* of the "Pacifico" is San Francisco and there is no occasion for resorting to any fictitious *situs* of domicile. In any event justice and convenience would make any such fiction surrender to the actual *situs* in the case at bar.

It is respectfully submitted that the affidavit of G. W. Bell with reference to this contention on the part of defendants (Tr. 73) is entirely sound. The provisions contained in the pamphlet do not purport to cover a transfer of a ship under process of a court having competent jurisdiction of the vessel and also of all parties interested in her.

Whether the provisions contained in the pamphlet represent Norwegian law is not proved. The pamphlet is not relevant so far as proof of Norwegian law is concerned, and it is obviously incomplete. Moreover it is even less relevant as proof of what the Norwegian law was at the times herein involved, since it purports to have been passed in 1917 whereas the transactions involved in this case took place in 1920.

The language of Sec. 1 contained in the pamphlet is that a ship or a share in a ship entered in the registry of Norwegian ships or for which a provisional certificate of nationality has been issued, must

not be transferred *in any form whatever* to any person who cannot be the owner of a Norwegian ship.

The holding in trust of a Norwegian ship by a citizen of Norway for a person who cannot be the owner of a Norwegian ship, is not a *transfer* either of the ship, or of a share in the ship. If permission could not be secured from the Norwegian government under the provisions of Sec. 2 quoted in the pamphlet, it would be quite possible for this Court to appoint a Norwegian citizen to hold the ship in trust for plaintiff corporation. But the provisions of Sec. 2 are a sufficient answer to defendants' contention in and of themselves.

Nothing can better illustrate, perhaps, the fallacy of the arguments of defendants than the quotation of the English authorities of *Ex parte Yallop* and *Ex parte Houghton.* Were they to be relied upon as representing the English law in 1920, the court would be misled, as the latest edition of *Lewin on Trusts,* 12th Edition, page 187, after citing these two cases, says:

> "The law has, however, now been modified so as to allow of a beneficial interest in a ship in persons not appearing on the register, and under the Act now enforced, although no notice of trust is allowed on the register, equitable interest may be enforced by or against the register, equitable interest may be enforced by or against the registered owners and mortgagees of ships, or in respect of their interest therein, in the same manner as they may be

> enforced in respect of any other personal property and it follows that if a ship be purchased by A in the name of a stranger there will be a resulting trust in favor of A."

The author then cites the various statutes showing the modification in the law, and also the case of *Chasteauneuf v. Capeyron,* 7 App. Cas. 127.

Finally, in answer to this contention of defendants it is to be noted that the very ship here in question was transferred by her Japanese owners to a Norwegian.

As suggested above, the defendants imaginary difficulties of making transfer of the vessel to plaintiff in the event of a decision on final hearing that plaintiff is entitled to the vessel, could very simply, in any event, be avoided through the Court either requiring defendant Eriksen to make transfer to some Norwegian citizen as trustee for plaintiff, or through requiring defendant Ericksen himself to hold the vessel in trust for plaintiff, or through having the transfer made by a commissioner appointed by the Court, which would avoid the necessity of defendants doing any act relating to the transfer.

It is respectfully submitted that this Honorable Court, should affirm the very conscionable and astute exercise by the experienced and able Equity Judge of the District Court of his discretion in granting the interlocutory order appointing a receiver *pendente lite* in this suit, particularly after the defend-

ants had refused to accept the reasonable and lenient alternative which was extended to them.

Dated, San Francisco,
October 22, 1921.

Respectfully submitted,
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